85-2106

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

vs.

PI KAPPA ALPHA FRATERNITY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio

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ADDITION TO PETITIONER'S STATEMENT OF THE CASE

In addition to the facts supplied by Petitioner in this case, Respondents wish to point out that the parties below agreed that the Pi Kappa Alpha Fraternity House was a residence, and that the area in which the evidence was observed was a private residential area restricted to members.

JURISDICTION

Respondents disagree with Petitioner's statement that the Supreme Court of Ohio felt compelled to rule as it did by federal constitutional considerations. The

Supreme Court of Ohio's opinion makes it clear that the Ohio State Constitution mandated its decision. The review of federal and state Court decisions contained in that opinion was simply for the purpose of demonstrating that no exception to the warrant requirement contained in the state constitution mandated a different result.

REASONS FOR DENYING THE WRIT

1) The decision of the Ohio Supreme Court correctly interpreted the Ohio Constitution to require suppression of evidence gained by deceptive entry into a private residence where the invitation to enter was not extended by the occupant for the purpose of conducting illegal activities.

The officers in the instant case were not equipped with a search warrant when they gained entry to Defendant's premises. It is axiomatic in our criminal justice system that warrantless searches are, per se, unreasonable, unless they fall within one of the established exceptions. *Katz* v. *United States*, 389 U.S. 347 (1967); *State* v. *Sperry*, 72 Ohio Op. 2d 296 (1974). Thus, the officers' initial intrusion must be presumed unreasonable unless it fits one of the recognized exceptions to the warrant requirement. Clearly, none of these exceptions apply in the case at bar. Consent and plain view are the only possible exceptions under these facts. The Trial Court considered and rejected both in its decision.

The Trial Court's opinion discussed the possibility of consent as an exception to the warrant requirement in the case at bar. It concluded, after hearing the evidence, that the State of Ohio failed to sustain its burden of

proving consent. The claim of consent should always be viewed with suspicion by the Court. Courts "indulge every reasonable presumption against waiver." *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The State bears the burden of proving that consent to search was freely and voluntarily given. *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968). As the Trial Court noted, consent gained by deception cannot be said to be freely and voluntarily given. Even where Defendant knowingly and voluntarily admits a police officer to his home for another purpose, he cannot be held to have thereby waived all Fourth Amendment protection. The Supreme Court of Ohio addressed this issue in *City of Lakewood* v. *Smith*, 1 Ohio St. 2d 128 (1965). The first headnote to that case states, "(a) person who admits a police officer to his premises in compliance with the officer's request for an interview, does not thereby waive his constitutional immunity from unreasonable searches, nor does he thereby consent to a search of the premises." If the Court found no consent in *Smith*, where the Defendants voluntarily admitted known police officers into their home, it is clear that no consent or voluntary waiver can be found in the instant case, where the Defendant was deceived by the police officers and did not voluntarily admit them.

2) Federal case law interpreting the Fourth Amendment to the United States Constitution and recognizing exceptions thereto, does not conflict with the decision of the Ohio Supreme Court.

The drug transaction cases cited by counsel for the State are inapplicable here. While these cases all agree that police officers may misrepresent their identity in order to make a purchase of narcotics in a defendant's

home, the decisions are based upon the particular circumstances involved in narcotic sales cases. The key case from this Court on entry by deception to make a narcotics buy is *Lewis* v. *United States*, 385 U.S. 322 (1966). That case sets out the differences between narcotics buy cases and the case at bar:

> "But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, *supra*, is sufficient to dispose of that contention. *Id.* at 211.

Lewis distinguishes narcotics purchase cases from ordinary searches of a residence. The reason for the distinction is the fact that the narcotics seller has converted his home into a commercial center and made a general invitation to the public to enter his home to conduct illegal business. The fact of the purchaser's identity is only incidental, as the *Lewis* Court noted, "(i)n the instant case, on the other hand, the petitioner invited the undercover agents into his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price." *Id.* at 210. Even in those circumstances of very limited Fourth

Amendment protection, however, the Court notes that an agent so admitted to Defendant's home is not authorized to conduct a general search for evidence. The *Lewis* Court, in upholding the limited entry, found that, "(d)uring neither of his visits to petitioner's home did the agent see, hear, or take anything that was not contemplated and, in fact, intended by the petitioner as a necessary part of his illegal business." *Id.* That is certainly not true of the case at bar. Respondents here have made no invitation to the general public to participate in the purchase of liquor, legal or otherwise, in this establishment. In fact, it is quite clear that the fraternity house is open only to members of the fraternity and their expressly invited guests. The agents were aware of that restriction, as indicated by their choice of deception in the case at bar. Nor was any illegal activity contemplated in the invitation made to the liquor agents here. They were invited to inspect the premises, not to purchase liquor. Their purpose in gaining entrance to the premises was to conduct a general search. This is the express purpose forbidden by the Court in *Lewis*. Their intrusion resulted in the carrying away of evidence; which was not contemplated in the original invitation; another result which is expressly disproved by *Lewis*.

At least one other Municipal Court in Ohio faced with a similar situation found that liquor agents committed a trespass by being on the premises of a private club, restricted to members, without permission or warrant. *State* v. *Cooper*, 28 Ohio Op. 2d 361 (1963). In *Cooper*, liquor agents entered the premises of the Indian Lake Yacht Club passing over a bridge and through a gate containing a sign stating members only. The gate had no lock or latch and there was no guard posted to bar their presence on the premises. The agents remained on the premises for some period of time without being chal-

lenged or asked for their identity. Their observations led to the filing of a complaint for illegal liquor sales. In suppressing the evidence of those observations, the Court stated "The facts as stipulated indicate the prosecuting witnesses entered upon the named premises as trespassers and as such trespassers would not be competent to testify against the defendant." The Court went on to note that if the Defendants were permit holders under the liquor control law, they would have been presumed to have consented to such search. Since no such presumed consent existed in that case, however, the Court found that a search warrant was required to support the intrusion of the agents onto yacht club property.

Thus, the Ohio Supreme Court's decision in the instant case follows the interpretation other Ohio courts have placed on the state constitution's search and seizure provisions. Furthermore, its decision is not in conflict with this Court's interpretation of the federal constitutional guarantee. No conflict exists which would justify further consideration of this question.

CONCLUSION

The investigating agents' failure to obtain a search warrant for their initial intrusion into the Respondents' home violated the provisions of the Ohio Constitution. No recognized exception to the warrant requirement mandated admission of evidence so obtained. Under these circumstances, the decision of the Ohio Supreme Court neither conflicts with Federal case law, nor constitutes error. For all the reasons stated above, Respon-

dents respectfully suggest that this is not an appropriate case for review by this Court.

Respectfully submitted,

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